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November 16, 2007

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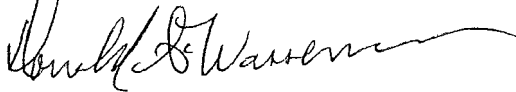
Ms. Kerry E. Creighton, Esq.  
Office of the Solicitor  
US Department of the Interior  
1849 C St. NW MS7308  
Washington, DC 20240

RE: Federal Mediation and Conciliation Service Case #07-53234 (Park Police/FLSA)

Dear Mr. Burchell and Ms. Creighton,

Enclosed is a copy of my Decision and Award in the above referenced case. Also enclosed is a copy of my invoice.

Yours truly,



Donald S. Wasserman

✓ CC: Jim Austin, FOP

November 16, 2007

Re: Federal Mediation and Conciliation Service Case No. 07-53234 (FLSA Coverage).

Fraternal Order of Police, FOP/USPP Labor Committee and U.S. Department of Interior,  
U.S. Park Police (USPP)

Representing the Union: K.L. Burchell, Esq.  
Representing the Agency: Kerry E. Creighton, Esq.

Before: Donald S. Wasserman, Arbitrator

**I. BACKGROUND**

This dispute evolved over a disagreement of 1) which statute(s) determines how U.S. Park Police officers are entitled to be compensated when working overtime, 2) the nature of the overtime work and type of compensation that officers are to receive; 3) as well as the application and authority of agency regulations and policies, and the collective bargaining agreement (CBA). Statutes in question are Title V of the District of Columbia Code (DC Code), Fair Labor Standards Act (FLSA), 29 U.S.C § 201 et. seq., several sections of Title V of United States Code including the Federal Employees Pay Comparability Act (FEPCA) as well as the Code of Federal Regulations (CFR).

The parties agreed to forgo a hearing in this dispute. Instead they decided to exchange briefs and reply briefs. The parties also agreed that the following issues would be arbitrated.

1. What laws, rules and/or regulations govern how the Park Police pays its officers for performing overtime work?
  - a. Is it lawful for the United States Park Police to compensate officers who perform overtime work with compensatory time rather than premium pay?
  - b. Is it lawful for the USPP to compensate officers at a rate of one hour of compensatory time for each hour of overtime worked?
2. If the USPP has violated applicable law, what is the appropriate remedy? (According to the union brief other issues within the grievance were still being discussed, and if not resolved could be brought forward "at a later time if no settlement is reached").

In addition to agreeing on the issues the parties also stipulated that:

1. Bargaining unit members are non-exempt under FLSA.
2. USPP supervisors order officers to work overtime on occasion because of circumstance-driven issues.

3. Officers working overtime are compensated by compensatory time unless they work in connection with a special event or assignment as defined in DC Code § 5-1304 (a) (11) or circumstances provided in DC Code § 5-1304 (e).
4. When an officer receives compensatory time in lieu of overtime premium pay, the officer earns one hour of leave for each hour of overtime worked.
5. The union submitted a step 2 grievance on September 22, 2006 followed by a demand for arbitration on January 30, 2007. In relevant part the union grievance stated: "Currently, the Department mandates that officers who work overtime must receive compensatory time in lieu of overtime. It is the Union's position that it is an officer's prerogative, not the Department's decision, whether to receive overtime compensation or convert the overtime pay into compensatory time" (Mgt. Brief, Ex.A and Un. Brief, Att.1).

## II. POSITIONS OF THE PARTIES: ARGUMENT AND EVIDENCE

### A. The Employer

The following terms and names are used interchangeably to describe the employer: Interior Department, Department, Agency, USPP, Employer, and Management. It should also be noted that USPP refers to the Federal Employees Pay Comparability Act (FEPCA) while the FOP refers to the Federal Employees Pay Act (FEPA). FEPCA amended FEPA in 1990. The parties refer to the same statutory provisions of Title V of the US Code. Here each term is used as the parties use them, and have the same meaning.

Management's brief asserts that Title V of the DC Code specifically governs the compensation of overtime for non-exempt officers. Principles of statutory construction provide that "specific legislation prevails over more general legislation" (citations omitted here). Further, that "specific statutes are not submerged by later general statutes." Congress, in adopting § 5-201 of the DC Code, established the USPP in 1882 to "perform the same power and duties as the Metropolitan Police Department." Additionally, "Title V of the DC Code also establishes pay scales for the Park Police," including "extra compensation for officers working as technicians, dog handlers, or detective sergeants." In 1965 Congress amended Title V § 1304 to specify how overtime work by police should be compensated (P.L. 89-282). This set the overtime rate for special events, mostly court duty and other situations provided in Section 1304 (d) and (e), at "payment at one and one-half times the basic hourly rate" for privates, detectives and sergeants. "An officer may choose to receive compensatory time off in lieu of premium pay." Congress also expressly provided "compensatory time off at the rate of 1 hour of compensatory time for each hour of overtime work" for such work "in all other circumstances." Management may establish the time frame "during which compensatory time may be used." If an officer's request to use compensatory time earned is denied, the officer may request compensatory pay (1 hour pay for each hour of overtime) rounded to the nearest hour.

Other than these statutory mandates the management brief also called attention to an April 2006 Memorandum of Understanding (MOU) outlining the policy for using compensatory time (Mgt. Brief, Ex. B) which shows that “the Union recognizes that the Agency may award compensatory time and regulate the use of compensatory hours that are earned.” Exhibit C of the management brief is Park Police General Order (G.O.) No. 30.01 titled Compensation, Differential, and Premium Pay which “mirrors Section 5-1304 of the DC Code.” The brief maintains that the Agency’s policies concerning overtime are consistent with the DC Code and thus lawful.

The brief then asserts that “DC Code Prevails Over FEPCA and the FLSA. It argues that “FEPCA specifically excludes the Park Police from its coverage. Furthermore, the FLSA does not specifically address compensatory time for federal employees, and therefore cannot prevail over the specific provisions in Title V of the DC Code.” Clearly, Congress intended to authorize compensatory straight time for certain types of overtime work.

The brief rejects any argument that USPP officers’ overtime compensation is governed by FEPCA. While FEPCA generally provides for federal employee overtime compensation at time and one-half, it “explicitly states that it does not apply to the Park Police.” Further, compensatory time for federal employees is not specifically addressed by FLSA; therefore the specific provisions of the DC Code prevail. Moreover, the DC Code set the pay scales for USPP. If the DC Code was repealed by FLSA there would not be any pay scales or any other Title V benefits applying to these officers.

Central to the agency’s position is their point that 5 CFR 551 governs overtime for FLSA non-exempt federal employees in accord with 5 CFR 532.503 (a) (1). And 5 CFR 551.501 (a) (5) “clearly provides that the overtime regulations in Part 551 do not apply to employees “engaged in fire protection or law enforcement activities when the employee...is not an employee (as defined in 5 USC 5541 (2)), for the purposes of 5 USC 5542, 5543 and 5544.” This specifically excludes USPP officers from the definition of an employee, “other than for purposes of sections 5545 (a) and 5546.” The agency brief therefore concludes that “the overtime provisions in Part 551 that provide that employers cannot require an employee to accept compensatory time as payment for overtime work are also entirely inapplicable to the Park Police.” Moreover, 5 CFR 550.101 (b) (9) concerning premium pay does not apply to USPP except for night, holiday, or Sunday work. Thus, the brief asserts, 5 CFR 550.114 which permits compensatory time at the request of an employee does not apply to the USPP officers. In any event, the brief further argued, even if FEPCA applied, “there is no statutory basis for the Union’s claim that officers should be compensated with compensatory time at a rate of one and one-half the officer’s basic rate of pay” because 5 USC 5543 (a) (1) and (b) state that compensatory time should be granted (at the employee’s request) “for an equal amount of time spent in irregular or occasional overtime work.” 5 CFR 551.513 and 550.514 are also cited. Therefore, even if USPP could pay compensatory time at the request of the employee only, it would not be at time and one-half. OPM regulations expressly prohibit it.

In directly addressing FLSA the management brief argues that there is no language in the statute “specifically addressing overtime compensation for the Park Police as there is in the DC Code, (therefore) FLSA clearly does not govern overtime compensation in this case.” “Congressional intent clearly indicates that the provisions in the DC Code govern overtime compensation for the Park Police.” The employer “does not dispute that the FLSA applies to non-exempt employees where Congress has not enacted any other legislation on the subject. However, to the extent the FLSA conflicts with the DC Code, the DC Code prevails.” Further, FLSA compensatory time provisions apply only to state and local governments; they do not apply to federal agencies. This is contrasted to the DC Code which specifically provides for compensatory overtime for Park Police. The DC Code § 5-1304 specifically covers USPP and has also been amended more recently (December 2000) than FLSA (29 USC 207 (o)) and therefore prevails on both counts. Finally, under FLSA compensatory time must be granted at the rate of one and one-half hours for each hour of overtime worked whereas FEPCA provides that where applicable compensatory time is granted at an amount equal to the number of hours worked. Neither statute (FLSA or FEPCA) provides compensatory time at a rate of one and one-half for federal employees. “Congress did not intend for federal employees to receive compensatory time at any rate other than one hour for each hour worked.”

Moreover, time and one-half compensatory time would provide officers with a “windfall” inasmuch as the DC Code provides compensatory time rounded to the nearest hour; 30 minutes or more is credited as one hour. Officers who work 30 minutes overtime would be credited with one hour and therefore would be credited with one and one-half hours. So, 30 minutes of actual overtime would be credited with 90 minutes of compensatory time.” This would “result in an unreasonable financial burden on the Agency...(and) also adversely affect the Agency’s ability to allocate its workforce resources efficiently and effectively,” according to the brief.

While denying that the union is entitled to any remedy because the DC Code governs, the management brief also maintains that if this Decision and Award finds that it has “violated statutory requirements regarding compensation for overtime work performed, damages should be limited to lost wages, minus the value of any compensatory time the officers have already received.” It cites Roman v. Maietta Construction, 147 F. 3d 71, 76-77 (1<sup>st</sup> Cir. 1998). Any union request for liquidated damages should be denied as inappropriate because USPP acted in good faith in relying on the DC Code. 29 USC 260 provides that “if the employer shows...that the act or omission giving rise to such actions was in good faith and that he had reasonable grounds for believing that his act of omission was not a violation of the (FLSA)...the court may, in its sound discretion, award no liquidated damages.”

## B. The Union

The union brief argues that USPP current practice of determining overtime compensation - - premium payments and compensatory time - - “is not supported by law as DC Code § 5-1304 was implicitly repealed and the policies and procedures for determining overtime compensation and compensatory time are regulated by” FLSA, 29

USC § 201 *et. seq.*; and FEPCA 5 USC § 5101 *et. seq.* Thus the agency “may authorize compensatory time off in lieu (of) overtime premium pay only upon an officer’s request”, and any such time off must be “in the amount of one and one-half hours off for each hour of overtime.” Given the actions of USPP management, “damages costs and fees should be awarded.”

The relevant sections of the DC Code were enacted in October, 1965 and not subsequently amended. The DC Home Rule Act was enacted in December, 1973. The DC Council “was expressly prohibited from enacting or repealing any act of Congress which concerned the functions of the United States or is not exclusively controlled by the District.” FLSA standards were extended to federal employees in 1974. OPM has been granted “exclusive authority to administer and interpret FLSA’s statutory protections for nonexempt federal employees.” The only agencies exempt from OPM’s authority are the U.S. Postal Service, Library of Congress, Tennessee Valley Authority and Postal Regulatory Commission. Also, the DC Metropolitan Police were removed from the DC Code’s § 5-1304 coverage and relevant DC law covering them conforms to FLSA.

The brief further asserts that “when two statutes appear to apply to the same legal issue, and there is no affirmative showing of an intention to repeal the earlier statute, both statutes should be given effect unless they are irreconcilable” (cite omitted here), “Alternatively, when two conflicting statutes cannot be reconciled, the older statute is repealed only to the extent of the irreconcilability” (cite omitted here). Clearly, relevant sections of the DC Code and FLSA cannot be reconciled. DC Code limits premium overtime payments to special events and other activities listed in the DC Code and USPP General Order 30.01 (Mgt. Brief, Ex.C). Other overtime work is credited as compensatory time on the basis of one hour credit for each hour of overtime - - not at the rate of time and one-half mandated by FLSA - - and permitted only when agreed to by the employer and employees under FLSA. The FOP brief also states that it “does not take issue with remaining provisions within the statute (DC Code) at this time.”

At several points the brief notes that although Congress conveyed primary authority over the District of Columbia (DC) to the DC Council, “the USPP are not within that authority as it is not under the exclusive control of the DC Council.” Authority was conveyed to the National Park Service in May, 1924. Congress extended FLSA protection to federal employees in 1974, one year after extending home rule to DC in 1973. The brief asserts that, “It would not stand to reason for Congress to extend FLSA protections to all federal employees, absent enumerated exceptions, and still allow DC Code § 5-1304 to govern overtime compensation of certain, nonexempt federal employees.”

The DC Council is precluded from enacting any law that governs USPP functions because the District does not have exclusive control over the Park Police; USPP is part of the federal executive as an organizational entity within the Interior Department. Hence, the DC Council does not have authority to repeal the DC Code as it applies to these officers - - as it did repeal the Code (5-1304) as it pertained to MPD officers. USPP acknowledges that its officers are nonexempt under FLSA but argues that the DC Code

governs overtime. This is contradictory. Nowhere, are these officers enumerated as exempt under FLSA, as are entities or employees who Congress intended to exempt. The brief asserts that “the only possible conclusion is that DC Code § 5-1304 was implicitly repealed when Congress extended FLSA application to federal employees.

Citing Branch v. Smith the FOP brief states “a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law.” Congress intended that FLSA provide minimum standards (wages and overtime) to those private and public sector workers meeting specified criteria. For these purposes the District of Columbia, although not a state, has taken on required state characteristics that permit a degree of status as a state. “The Department (Interior or USPP) cannot reasonably rely upon DC Code § 5-1304 because the FLSA, as a federal law intended to exclusively govern a clearly defined area, takes precedence.” USPP can’t “reasonably claim” that the DC Code governs overtime compensation for its police officers.

The brief then asserts that USPP “willfully violated both the FLSA and the FEPA” because it forced police to take compensatory time at straight time instead of premium pay at time and one-half for overtime worked. FOP argued that employees of state and local governments (including special and school districts) can elect to receive compensatory time at time and one-half for overtime worked in lieu of receiving monetary payment, when such a choice is made in conformity with an agreement between the union and public agency. In the case of unrepresented employees such an arrangement could be made by the employer and employee prior to the performance of the work. A union representing USPP “is precluded from negotiating pay and benefits with the Department (5 USC 7106 (a)...” FOP argues that nonexempt employees are governed by § 207 (FLSA), which authorizes compensatory time at time and one-half for overtime worked. Section 207 (o) applies to “employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency.” As described above these public agencies and their employees may agree upon compensatory time at a rate of time and one-half under the specific conditions set forth in § 207 (o). This is contrasted with 5 CFR § 532.504 which specifies in relevant part that “at the request of an employee, the head of a (federal) agency may grant compensatory time off...instead of payment...for an equal amount of irregular or occasional overtime work” (straight time). The brief then points out that the officers are specifically exempt from relevant parts of FEPCA concerning overtime compensation by 5 USC § 5541 (2) (C) (iv) (II). It concludes that “USPP bargaining unit officers cannot request compensatory time in lieu of overtime premium pay.”

The FOP brief cites an OPM 1997 interim rule change made pursuant to 29 USC § 204 (f) concerning compensatory time that became effective in January 2003. The rule change authorized “approval of requests for compensatory time off (and) is applicable to all prevailing rate employees, including those who are covered by FLSA.” It authorized an agency head to approve such a request in lieu of overtime pay stating that it was consistent with the “broad statutory language of 5 USC 5543, which provides that the head of an agency may grant a request for compensatory time off from an employee’s

scheduled tour of duty instead of payment under (5 USC 5542 or 5544) or Section 7 of the FLSA for an equal amount of time spent in irregular or occasional overtime work.” The OPM rule change also includes “nonexempt members of the United States Park Police.”

These revised regulations (62 Fed. Reg. 28305-06) also state that an employee may not be “intimidated, threatened, or coerced to request or not to request compensatory time off. The FLSA regulations on compensatory time off already provide that compensatory time off may not be required for nonexempt employees.”

Clearly, agency management is “authorized to permit law enforcement officers to elect compensatory time in lieu of premium pay.” Just as clearly a USPP officer cannot be forced to “accept compensatory time in lieu of overtime premium pay.” Nothing in FLSA, FEPCA or OPM regulations “grants agency heads the authority to order employees to receive compensatory time in lieu of overtime premium pay.” The use of compensatory time must be initiated by the officer’s request “of his or her own volition.”

When compensatory time is requested and granted it must be at the rate of one and one-half hours for each hour of overtime worked. The brief cites 5 USC 5543 (a) (1), arguing that compensatory time off may be granted (upon request of the employee) “under section 5542 or section 7 of (FLSA) for an equal amount of time spent in irregular or occasional overtime work,” and adds that “the relevant portions of the FEPA concerning the calculation of overtime premium pay are not applicable to those federal employees who are FLSA nonexempt, See USC 5542 (c).” It concludes, therefore, that section 207 (o) of FLSA mandates that time and one half premium overtime pay convert into compensatory time at the same rate. FLSA prohibits the use of compensatory time to avoid paying time and one-half.

The brief’s Attachment 3, GO 95.0 (III G) is cited as support for its assertion that USPP “has sought to forcibly make bargaining unit officers take compensatory time instead of overtime pay and then has actively sought to enable the forfeiture process to go forward as a means of eliminating expense: “A Force officer is encouraged to request annual leave and compensatory time sufficiently in advance of forfeiture dates...” The brief’s Attachment 4, Memorandum No. 3 from the chief of the USPP date April 25, 2005, is also cited: “An employee must use his or her accrued compensatory time off for travel by the end of the 26<sup>th</sup> pay period after the pay period in which it was credited or the employee must forfeit such compensatory time off, except in certain circumstances.” The brief asserts that the “clear intent and meaning of the FLSA” is to pay compensatory time at time and one-half, not straight time. “Thus it is illegal to compensate officers at a rate of one hour of compensatory time for each hour of overtime worked...”

In light of USPP’s “failure to abide by the FLSA, and the FEPA the FOP brief requests (1) that the Department be ordered to compensate its officers for those overtime hours worked within two (2) years of the filing of this grievance (September 22, 2004); and (2) the Department be ordered to pay attorney’s fees, liquidated damages, and any other sanctions that are be deemed fit.” The brief cites 29 USC § 207 in requesting

compensation and § 216 (b) in requesting liquidated damages. Therefore, USPP should “be ordered to account for all compensatory time earned from September 22, 2004 (two years prior to filing the grievance) to date. Each officer who received compensatory time in lieu of overtime should be credited with one-half hour of compensatory time for each hour of compensatory time earned,” irrespective of whether the officer has used the compensatory time. “All compensatory time should be paid out as overtime compensation.” Thereafter, officers requesting compensatory time “should be given a definite period to make such a request.”

The brief further asserts that USPP “did not act in good faith,” thereby making it appropriate to award liquidated damages 29 USC § 260.” Bull, 68 Fed. Cl. at 229 was also cited in stating that good faith entails “an honest intention to ascertain what (FLSA) requires and to act in accordance with it.” Further, according to Adams v. United States, 350 F. 3d 1216, 1226 (Fed. Cir. 2003), “It is the employer’s burden to prove that it acted in good faith and had reasonable grounds for its decision.” Finally, the brief again pointed to Bull (quoted Beebe v. United States, 640F. 2d 1283, 1295 (1981)) in determining whether an employer has reasonable grounds, “[p]roof that the law is uncertain, ambiguous, or complex may provide reasonable grounds for an employer’s belief that [its actions conformed] with the Act even though [its] belief is erroneous.” Beyond these legal mandates the brief also charged that Article 3.3 of the CBA was violated in that it states that the employer “shall not act in an arbitrary or capricious manner when exercising its rights.”

The union brief cited a member of non-federal public sector cases to buttress its assertions that it is not permissible for the agency “to continue to ignore the law when confronted with clear illegalities by FOP.” According to the union, “it was clear that the Department never discussed this grievance with the FOP, despite being faced with clear legal errors in the application of USPP officer pay. (They) had been placed on notice that they were violating the FLSA.” The union first became aware that USPP “relied on DC Code § 5-1304 to support its position” on April 18, 2007 “when the parties exchanged formal legal responses in this matter.” The agency did not, at any time, “offer its reasoning for following a dated and inapplicable statute.” Any reasonable inquiry would have given cause for USPP to petition “OPM for a final ruling.” Instead the agency did nothing, including ignoring “OPM’s May 23, 1997 rule change” concerning compensatory time.

Again citing 29 USC § 216 (b) and Bull, the brief asserted that FOP “should be entitled to an award of reasonable attorney fees and costs...if the union prevailed” in this matter. The Back Pay Act, 5 USC § 5596 was cited in addition to FLSA, 29 USC § 216 (b) and several court decisions as justification for the request. The brief concluded by emphasizing that USPP “knowingly and willingly violated law, rule and regulation by using compensatory time as a method to avoid compensating its officers for their earned overtime hours by using a dated statute that was implicitly repealed.”

### C. The Employer's Reply

The brief argues that the "Union's Brief does not provide any legal support for its contentions that the DC Code has been 'implicitly repealed' and that...(FLSA), 29 USC §§ 201 *et. seq.*, and...(FEPCA) govern overtime compensation for US Park Police officers. Its argument that the (USPP) cannot mandate compensatory time at a rate of one hour for each hour of overtime worked is entirely contrary to plain statutory construction and Congressional intent." It further asserts that "the arbitrator has no jurisdiction to decide whether the DC Code has been repealed." In doing so "the arbitrator would clearly exceed his jurisdiction by finding in favor of the union." A finding that FLSA and FEPA govern "would need to find that section 5-1304 of the DC Code was implicitly repealed by section 207 of FLSA. This would require the arbitrator to "actually legislate" rather than to interpret the law inasmuch as "Congress has never stated that the provision is no longer in effect." The grievance procedure of the CBA (Mgt. Brief, Ex. A) merely gives the union the right to grieve over the interpretation of a law, not to amend existing statutes. CBA Article 8.1.C.1 states that a grievance is any complaint by...the union concerning: the effect of interpretation and/or the impact and implementation of any law, rule or regulation, and or a claim of breach, of this (CBA)."

The Interior brief then maintains that the union position actually "ignores the specific language of the DC Code." Its section 5-1304 "is the only statutory provision specifically providing overtime compensation for U.S. Park Police Officers." The FLSA does not specifically state that USPP may use compensatory time only "if an officer requests it and at a rate of one and one-half the base pay rate." Citing *Radzanover v. Touche Ross & Co*, 426 U.S. 148, 153 (1976) the brief asserts that, "it is well-established that specific legislation prevails over more general legislation concerning the same subject." Section 5-1304 specifically states when an officer is to receive compensatory (straight) time and when premium pay at time and one-half is required (DC Code 5-1304 (d), (e), (f)). FOP's position is based on FLSA provisions that do not address USPP. Section 207(a) provides monetary payments generally and Section 207 (o) applies only to state and local government employees, not federal employees.

The agency also disputed the union's claim that FEPA (as well as FLSA) govern USPP overtime compensations. On the one hand the union acknowledges that 5 USC § 5541 (2) (c) (iv) (II) excludes USPP officers from its definition of an "employee" other than for purposes of sections 5545 (a) and 5546, and on the other hand argues that FEPA governs overtime compensation, without explanation.

USPP vigorously denies the union's claim that section 5-1304 has been "implicitly repealed" as being "entirely unsupported by any legal authority and (as) contrary to long-established congressional intent." This section has "remained codified for over 40 years" despite the many amendments to Title V over this time, the most recent of which were adopted in 2000. The brief calls attention to the "well established principle" that "repeals by implication are not favored...and will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. U.S.*, 480 U.S. 522, 524 (1987). Also

cited are National Ass'n of Home Builders v. Defenders of Wildlife, 2007 U.S. Lexis 8312, at 32-33 (June 25, 2007); Kaiser Steel Corp. v. Mullins, 455 U.S. 72,88 (1982). Clearly, "the individual arguing for repeal has the burden of showing that the statute has been repealed...[and] there is a strong presumption against implied repeals of federal statutes..." U.S. v. Lahey Clinic Hospital, 399 F. 3d1,18 (1<sup>st</sup> cir. 2005). Congress did not show "intent" to repeal section 5-1304. Nor can it be "reasonably informed that Congress clearly intended for the general terms of the FLSA to repeal or supersede the more specific terms of the DC Code." Additionally, Congress amended 5-1304 in 2000 but did not change the language concerning compensatory time. This is all further evidence that Congress did not implicitly repeal 5-1304.

The brief addressed the union argument that DC Code 5-1304 and FLSA 207 are irreconcilable and that the older statute (5-1304) must be repealed. Contrary to the union's assertion, these statutes "can be, and have historically been, given effect." The DC Code mandates compensatory time for these officers; FLSA is silent on this matter, but that does not diminish FLSA force and effect, "which continues to govern overtime for most other federal employees. Neither statute is rendered ineffective or loses all meaning. Neither one is implicitly or intentionally repealed." Also, FLSA 207 was last amended five years prior to 5-1304.

In response to the union's argument that "it would not stand to reason" that Congress would extend FLSA to federal employees but permit the DC Code to govern for these employees, the brief points out that the USPP have their own pay scales and do not follow the general schedule applicable to most federal employees. "They are also excluded from the overtime benefits specified in 5 USC §5542 and §5543 which are applicable to most federal employees." "The union does not offer any explanation as to how or why future statutes would be inoperable if Section 5-1304 applied." Nor does the union explain its assertion that a federal statute overrides state laws. Congress adopted Section 5-1304 just as it did FLSA; and DC is not a state.

The USPP reply brief also states that there is "no legal support for the union's claim" that compensatory time should be at the rate of time and one-half. Here too the union relies on FLSA section 207(o) which does not apply to federal employees. "FEPA specifically states that compensatory time for federal employees should be paid at the rate of one hour for each hour of overtime worked" (5 USC 5543). Further, the union's charge that officers are unlawfully being forced to use their compensatory time is a non issue. It is not an issue in this grievance. And it is lawful for employers to insist that compensatory time be taken "within a specified period." In Exhibit B to this reply brief the union acknowledged (in a communications to its members) that the employer had the right to compel the use of compensatory time in certain circumstances (Christensen v. Harris County) to avoid paying cash for compensatory time balances.

The union relied on a 1997 OPM Interim Rule Change to support its claim that both FEPA and FLSA require that compensatory time may be granted only at the request of an officer. The union's claim is misplaced and incorrect according to the reply brief. It argued that the rule change affected 5 CFR § 532, 550, 551 and 610 as published in the

Federal Register (62 FR 28305) and asserts that “the overtime compensation provisions in these parts do not even apply to the US Park Police.” The brief argues that 5 CFR § 532.503 clearly states that overtime provisions in this chapter apply only to “employees exempt under the FLSA,” while the officers in question are nonexempt. Moreover, the brief states that various sections of Parts 550, 551 and 610 (cited in the brief) all exclude these officers from overtime compensation provisions. “In fact, the rule changes were intended to be consistent with 5 USC §5543 and 5 CFR §532.504 from which the Park Police are clearly exempt. The brief also asserts that, “There has been no issuance of any final rule specifically governing US Park Police overtime compensation.” Nor has the union “pointed to any final regulation addressing compensatory time for the US Park Police.”

The heading for the language relied upon by the union concerns compensatory time for prevailing rate (or wage board or blue collar) employees. USPP officers are not prevailing rate employees. Thus any rule change affecting such employees would not affect those officers. But, even assuming the language did apply to the USPP it would be “irrelevant because the DC Code expressly states that the US Park Police may require compensatory time regardless of whether an officer consents. It is well established that federal statutes preempt conflicting federal regulations” (cites omitted here). The brief also claims that the agency may not require an employee to receive compensatory time. 5 CFR § 532.504 applies only to FLSA exempt employees. In refuting the union argument that the employer is trying to have it both ways the brief argues that it is the union that is trying to have it both ways. The union argues that 5-1304 does not apply to overtime compensation although it wants to maintain current benefits under other sections such as extra compensations for technicians and dog handlers. Finally, on this point, the agency does not fashion its own pay rules as charged by the union. It follows the requirements of 5-1304 for purposes of overtime compensation as required by the DC Code.

The reply brief concluded by maintaining that the USPP has acted in good faith contrary to the union’s allegations. It has reasonable grounds for applying the DC Code in administering overtime compensation as explicitly written throughout its briefs. Neither Congress nor any other government entity has questioned its application of overtime compensation since 1965. If the union believed otherwise, it questions why it waited for 30 years before raising objections. Any determination that the DC Code does not govern would introduce “ambiguity, confusion, and complexity in the law where there is none now.” USPP has acted in good faith in the manner in which it compensates its officers for overtime work. “The union is not entitled to any relief.”

#### D. The Union Reply

The Centerpiece of the union argument is that FLSA governs when there is an “irreconcilable conflict” between that statute and the DC Code. Because the employer did not act in good faith the officers are entitled to compensatory damages, liquidated damages and attorney’s fees.

The agency fails to recognize FLSA's section 204(f) and does not argue that "it falls within any of the well-defined exceptions of §204(f)." The agency merely asserts that the DC Code applies. It does not recognize "Congress' delegation of authority over the District to the DC Council in 1973. See DC Code §1-201.01." Although the agency argues that DC Code §5-1304 is the most recent statute, under DC Code §1-206 (a)(3), "any amendments after 1973...concerning the USPP...would be illegal as...(it is a) federal government agenc(y) and the amendment would modify the functions of the United States government." When home rule was adopted District employees were no longer federal employees and therefore "no longer entitled to federal employee protections and benefits. See generally Atchison v. District of Columbia, 585 A: 2d 150 (D.C. 1991)." But USPP remained a federal agency. Had it become a DC agency it would have been fully "under FLSA's authority. See Harrison v. District of Columbia, 674 F. Supp 34 (D.D.C. 1987)." As a federal agency FLSA applies to USPP and continues to govern "through 29 USC § 204 (f) and the administration of FLSA is assigned to the Office of Personnel Administration (OPM)."

For example, when explaining a rule change concerning 5 CFR 551.501 (a) (5) OPM stated: This clarification is necessary because 5 CFR 551.501 (a) (5) can be interpreted to authorize an increase in overtime pay for employees of the...member of the United States Park Police. These employees are not covered by the overtime provisions of Title 5, United States Code but are covered by overtime pay provision in Title (5) DC Code, as well as by the overtime pay provisions of the FLSA." The union asserts that "the only reasonable interpretation of all laws, rules and regulations...reviewed by both parties is that the DC Code and the FLSA overlap in the area of overtime compensation." It is necessary to determine which provisions of both statutes apply to these officers.

The agency maintains that the DC Code applies because its language was specific to USPP and older statutes apply if they are more specific than newer statutes. However, this is true "only when the conflicting provisions can be reconciled." In situations, as here, when the statutes cannot be reconciled the earlier act is implicitly repealed to the extent of the conflict" (cite omitted here). The DC Code §5-1304 (d) and (e) provide for overtime at time and one-half pay for special events and assignments. This does not conflict with FLSA section 207 (a) (2) (C), so the DC Code governs as the statutes are reconciled and it is more specific. On the other hand, the DC Code §5-1304 (f) mandates only one hour of compensatory time for each hour of overtime worked that is not a special event or assignment, contrasted to FLSA section 207 which requires premium pay of time and one-half for all overtime hours worked. The union asserts that DC Code §5-1304 (f) and FLSA §207 (a) (2) (C) "cannot coexist." Obviously officers cannot receive both one hour of compensatory time and premium pay of time and one-half for the same hour of overtime worked. Since Congress extended FLSA to federal employees in 1974 and the DC Code §5-1304 could not be amended after the 1973 Home Rule Act by the DC Council, it was intended that the FLSA 1974 amendments must govern when they conflict with the DC Code.

The employer has the burden to demonstrate that it acted in good faith in applying FLSA (Adams v. United States). Instead it merely claimed that it was in full compliance

with the DC Code. There is no evidence that it sought an opinion from OPM or advice from any source outside the agency. To the extent there was a conflict with FLSA since 1974 it ignored FLSA's requirements. Moreover, their position here "is contrary to previous stances taken by the Department. In Long v. United States, Federal Claims Court number 05-143C, the Department "faced another compensatory time action involving this bargaining unit (Un. Reply Brief, Att.1). In this case the agency admits "that the FLSA governs this issue but instead argues that the FOP implicitly waived its FLSA protections in the (CBA)." To admit FLSA application in that instance and to deny it here is not fair, especially without explanation. This alone shows a lack of good faith.

Finally, the union asserts that USPP "knowingly and willingly violated law, rule and regulation by using compensatory time as a method to avoid compensating its officers for their earned overtime hours by using a dated statute that was implicitly repealed." It ignored the FOP when this was brought to their attention. Therefore USPP "should be ordered to compensate its officers for overtime hours worked, pay liquidated damages, in addition to attorney's fees and costs."

### III. ANALYSIS AND DECISION

As stated in the first section of this Decision and Award the parties did agree to the following issues to be presented to the arbitrator:

1. What laws, rules and/or regulations govern how the USPP pays its officers for performing overtime work?
  - a. Is it lawful for the USPP to compensate officers who perform overtime work with compensatory time rather than premium pay?
  - b. Is it lawful for the USPP to compensate officers at a rate of one hour of compensatory time for each hour of overtime worked?
2. If the USPP has violated applicable law, what is the appropriate remedy?

Neither USPP nor FOP is fully persuasive in asserting that only the DC Code §5-1304 or only FLSA/FEPCA (FEPA) govern in this matter. Actually FOP does acknowledge that in situations where DC Code and FLSA are fully compatible DC Code should prevail because it is more specific in that it addresses USPP officers only. Similarly, in Long v. United States the USPP acknowledged that FLSA "29 USC §207(a) would be one such law that requires payment of overtime compensation" to these officers (Union Reply Brief, Att. 1, Defendant's Supplemental Brief. Pg. 2).

- What laws, rules and or regulations govern how the USPP pays its officers for performing overtime work?

In a sense these parties are held hostage by a foggy legislative and regulatory process and their perceived "institutional imperative" to interpret the US and DC Codes as well as the CFR to their own unique and distinct advantage. To expect them to do otherwise would be to ignore our system of advocating for their self interest. In this case the assertions of both parties, although diverse and somewhat

contradictory, are factual in part. Section 5-1304 of the DC Code was not “implicitly repealed,” as asserted by the FOP. Certainly, Congress had a number of opportunities to repeal or amend that section when amending FLSA and when amending FEPA. The decision not to repeal must be accepted as purposeful. Both FOP and USPP agree that the officers in question are covered by FLSA and are nonexempt, thus eligible to receive certain benefits for working overtime. Specifically, this agency and/or its employees are not enumerated as excluded under 29 USC 203(e). It is also understood that OPM “is authorized to administer the provisions of this chapter (FLSA) with respect to any individual employed by the United States” except for employees of specific agencies cited earlier, which do not include the USPP. See 29 USC §203, 204 and 5 USC §105 and 2105. The mandates in these provisions are clear and specific. USPP officers are protected by FLSA and the applications of that statute for federal employees is administered by OPM.

This is distinct from the issue of pay schedules and pay administration. Employees in several government agencies are on pay schedules that vary from or provide pay benefits distinct from Title V’s General Schedule. Two examples are Veterans Administration health care employees who work under Title 38, and employees of the Federal Aviation Administration - - to say nothing of recent legislation covering Defense Department and Homeland Security employees. These agencies and their employees remain fully covered by FLSA. The issue of coverage and pay administration are mutually exclusive.

The complicating factor is 5 USC 5541 (2) (C) (iv) (II) which specifically excludes members of the USPP from the definition of “employee” for pay administration purposes except for §5545 (a) and 5546 (nightwork and Sunday and holiday work respectively). Thus, the grieving officers are not employees covered by sections 5542 (Overtime rates; computation); 5543 (compensatory time off); 5544 (not relevant); 5545 (Night, standby, irregular, and hazardous duty differential). The non-employee status of these officers lends credibility to both the FOP’s assertion that FLSA must govern and USPP’s equal insistence that 5 DC Code 1304 must govern. Your arbitrator states that both must be considered! In sum the DC Code as well as USC’s Titles 5 and 29 and the CFR must be reviewed. Also to be considered are relevant agency regulations and the parties CBA. In this respect it should be noted that FLSA is legislation designed to provide minimum standards for both wages and overtime compensation, below which an employer may not pay. For example in the private sector and in non federal public agencies that statute mandates only that employers must provide premium pay of time and one-half for overtime work. It does not prohibit, for example, premium pay of double time for overtime. To emphasize: section 5541 exempts USPP officers for pay administration purposes under title 5 only. It does not diminish protections for these employees under FLSA (5CFR Part 551).

- Is it lawful for the USPP to compensate officers who perform overtime work with compensatory time rather than premium pay?

Yes, but under narrowly prescribed conditions only as ruled below when comparing the provisions of FLSA and the DC Code for purposes of computing benefits. The FOP Brief, pages 9,10, (with appropriate Federal Register citations) repeats the 1997 OPM Interim Rule Change which became final in 2003. OPM stated in relevant part that, "This change will, for example, permit the applicable agency heads to approve requests for compensatory time off for nonexempt members of the United States Secret Service Uniformed Division or nonexempt members of the United States Park Police." OPM acted within its authority granted by 29 USC §204(f). The change made it clear that, "The revised FLSA regulations also provide that no employee covered by the FLSA may be intimidated, threatened, or coerced to request or not to request compensatory time off. The FLSA regulations on compensatory time off already provide that compensatory time off may not be required for nonexempt employees." Refer to 5 CFR 551.531 (a through g) for specific details, as well as 5 CFR 551.541 for specific provisions for law enforcement officers who work under section 7 (k) FLSA.

- Is it lawful for the USPP to compensate officers at the rate of one hour of compensatory time for each hour of overtime work?

Yes, but only if the officer requests compensatory time in lieu of premium pay and the agency head agrees to the request again as written below. The agency and its employees must act in accord with 5 CFR 551.531 (c) concerning intimidation, threats or requirements. The FOP's assertion that such compensatory time be awarded at a rate of time and one-half is denied. 5 CFR 551.501 (a) clearly distinguishes between premium pay "at a rate equal to one and one-half times the employee's hourly regular rate of pay, except that an employee shall not receive overtime compensation under this part..." but rather, "For hours of work compensated by compensatory time off under §551.531 of this part;" see especially §531 (a) "...compensated for overtime work...with an equivalent amount of compensatory time off..." The parties must also be mindful of the constraints of §551.521 (a) and (b) (Fractional Hours of Work) which states that "An employee shall be compensated for every minute of regular overtime work." Further, that "A quarter of hour shall be the largest fraction of an hour used for crediting irregular or occasional overtime...(and that) odd minutes should be rounded up or rounded down to the nearest full fraction of an hour..." This contrasts with the DC Code's §5-1304 which rounds to the nearest hour. As written below this discrepancy must be resolved for officers who request and are authorized to take compensatory time.

- If the USPP has violated applicable law, what is the appropriate remedy?

The parties should be aware of 5 CFR 551.513 which provides in relevant part: "An employee entitled to overtime pay under this sub-part and overtime pay under any authority outside of title 5, United States Code, shall be paid under whichever authority proves the greater overtime pay entitlement in the workweek." Note that 5 CFR 551 is "Pay Administration Under the Fair Labor Standards Act," (Title 29).

Clearly, USPP has violated applicable law by determining that the DC Code must govern in all situations in which there is a clash between 5 DC Code 1304 and FLSA as

applied to federal employees by FEPA, FEPCA and the CFR. The USPP assertion that MOU 06-01 (Mgt. Brief, Ex.B) demonstrates that “the Union recognizes that the Agency may award compensatory time and regulate the use of compensatory hours that are earned is not persuasive.” The MOU merely states that the union understands and acknowledges how the agency administers FLSA. The Union’s agreement is limited to some of the processes of such administration. It does not state agreement with the USPP requirement that officers use compensatory time for some types of overtime hours worked. The agreement is limited to how that time is used. Nor does the MOU contribute a waiver of union or membership rights. Similarly General Order 30.01 (Mgt. Brief, Ex.C), an agency rule which merely tracks the DC Code does not have the weight of a government wide rule. It does not trump Title 5 or Title 29 of the US Code or government wide rules or regulations.

The brief also states that the DC Code must prevail over FLSA and FEPCA because “FEPCA specifically excludes the Park Police from its coverage. Furthermore, the FLSA does not specifically address compensatory time for federal employees, and therefore cannot prevail over the specific provisions in Title V of the DC Code.” These assertions are simply wrong, as shown above in this Decision and Award. Similarly addressed above is USPP’s assertion that because the DC Code sets the pay scales for USPP it must govern for purposes of overtime. The brief acknowledges that 5 CFR 551 governs overtime for nonexempt federal employees but denies that it applies to law enforcement or fire protection because of USPP’s exclusion under 5 USC 5541 (2) for purposes of §5542, 5543, 5544 and part of §5545. This confusion has also been addressed above and need not be repeated here. Also, as shown above, OPM rule changes now permit USPP officers to request compensatory time at “an equal amount of time spent in irregular or occasional overtime work.”

In fashioning a remedy for USPP’s continuing violation of requiring officers to use compensatory time rather than paying them premium pay at time and one-half their regular hourly rate, it is necessary to look backwards. Subsequent to FLSA coverage being extended to federal employees in 1974 there were conflicts between the requirements of Title 29 and Title 5 concerning overtime compensation for nonexempt employees. For several years federal agencies were required to perform overtime pay computations for FLSA nonexempt employees under both title 5 and title 29 of the USC (see FPM Letter 551-24 dated January 14, 1992). Employees were entitled to overtime pay under whichever title (5 or 29) “provided the greater overtime entitlement for the workweek.” It was later acknowledged that “the requirement for a dual computation of overtime pay entitlements and a comparison between the two results created considerable administrative difficulties.” Nevertheless federal agencies were required to cope with this requirement until FEPCA was adopted in 1990 and implemented in 1991. Section 210 of FEPCA amended 5 USC 5542 to eliminate the requirement to perform the overtime pay computations under both Title 5 and FLSA. Instead, overtime pay for nonexempt employees is now computed solely under FLSA. OPM interim regulations to implement Section 210 of FEPCA became effective on May 4, 1991, from which time “overtime pay computations for nonexempt employees must be made solely in accordance with the...(FLSA) regulations in Part 551 of Title 5, (CFR) as amended.” No longer were

agencies required to compare Part 550 and Part 551 to determine which provided the greater benefit. However, this solution to the different statutory requirements does not apply to these parties because the conflict involves the DC Code rather than the US Code.

It is well understood that the Federal Personnel Manual was abandoned in the early 1990s and no longer exists officially. Nonetheless, it is very instructive in understanding how OPM - - the administrative agency - - dealt with two equally compelling, but sometimes contradictory statutes. Neither statute was considered to govern or to trump the other, either because of age or specificity. Whichever title provided the greater entitlement in a given situation governed that specific situation. This should have informed USPP. Instead of rigidly insisting on following the DC Code and dismissing its conflicts with FLSA, the agency should have engaged in a computation process similar to that demanded of federal agencies. At the very least it should have made an official inquiry requesting guidance from the OPM and/or the Interior Department. Such an inquiry could have been made at any time subsequent to FLSA's extension to federal agencies. It would have given USPP an official opinion on how to administer overtime compensation.

The issues in this dispute are thereby not irreconcilable; nor hopefully, are the parties. Time and one-half is and has been paid for specific overtime assignments as spelled out in the DC Code. That will continue unless the officer requests compensatory time and the agency head agrees, in which case the compensatory time shall be at straight time - - one hour for each hour worked. It is anticipated that there will be relatively few such requests and authorizations.

The major problem concerns overtime work for which the DC Code requires that compensatory time be granted. Obviously, any computations or comparison of the requirement of the DC Code and FLSA with respect to required compensatory time at straight time wages versus premium pay at time and one-half will result in the employee receiving the greater entitlement of premium pay at time and one-half. This would not preclude the employee from voluntarily requesting, and the agency head authorizing compensatory time.

From this date forward such overtime work must be paid a premium of one and one-half times the regular hourly rate, unless the officer voluntarily requests and the agency head authorizes compensatory time at one hour for each hour worked. Here too, it is anticipated that there will be relatively few such requests. The point is that officers will no longer be required or forced to be compensated with compensatory time rather than premium pay at the rate of time and one-half.

However, one situation would actually require the employer to carefully compute entitlements under the DC Code and FLSA. It is where an officer earns overtime hours that do not equal one or more whole hours. Because of different rounding procedures used by FLSA and the DC Code either could provide a greater entitlement. For example if an employee works 25 minutes overtime he or she would be entitled to 30 minutes of overtime under FLSA where time is rounded up or down to the closest quarter hour,

whereas that employee would not be entitled to any overtime under the DC Code where time is rounded to the nearest full hour. The DC Code requires 30 minutes of overtime to earn one hour of overtime. On the other hand, if that employee worked 50 minutes of overtime he or she would earn one hour of overtime under the DC Code, but only 45 minutes under FLSA.

FOP's Reply Brief requests that USPP "should be ordered to compensate its officers for overtime hours worked, pay liquidated damages, in addition to attorney's fees and costs because it "knowingly and willingly violated law, rule and regulation..." For its part the USPP Reply Brief argued that "The Union is not entitled to any relief, (because) the Agency acted in good faith and has reasonable grounds for applying the DC Code..." Also, "it has not acted in bad faith." In its initial brief USPP also maintained that "should the Arbitrator find that the Park Police has violated statutory requirements...damages should be limited to lost wages, minus the value of any compensatory time the officers have already received."

Knowingly or unknowingly USPP did violate the FLSA and therefore its officers are entitled to an appropriate remedy, specifically back wages. Where non-willful violations are committed, as here, the statute of limitations under FLSA is limited to two years prior to the submission of the complaint; the grievance in this case was submitted on September 22, 2006. Thus, USPP must pay the affected officers - - those who were required to take compensatory time - - back wages for all such overtime hours worked. Such back wages shall be minus the value of the compensatory time already taken. Such back wages must be paid from the period beginning September 22, 2004 and continue until USPP implements the required computations described above and the employees are made whole.

USPP should consult with OPM in implementing such a computation system and share the methodology with FOP so that "all hands" understand their entitlements and obligations.

The FOP's request for liquidated damages is denied. Although, as FOP's brief stated, that the burden to demonstrate good faith rests with employer, and it is a high bar, the arbitrator determines that liquidated damages are not warranted in this case. Although it may be arguable whether the employer acted in good faith, it did rely on the DC Code since 1965. Beginning in 1974, with the extension of FLSA coverage to federal employees, the USPP policies went unchallenged. Even after the FOP became the exclusive representative of this bargaining unit in the late 1990's it took several years for this matter to be grieved. Therefore, it appears that USPP was not unreasonable in continuing to be guided by the DC Code. Similarly, requests for damages, either compensatory or punitive, are not warranted in this dispute. The major issue is for USPP to correct its unlawful behavior concerning the compensation of overtime. This Decision and Award so orders.

Attorney fees are a different matter. It does appear that FOP is entitled to recover such fees and costs. The union is charged with briefing this matter both as to the amount

and construction of reasonable fees and costs and any such justification deemed appropriate. Their brief shall be sent no later than C.O.B. Monday, December 4, 2007. The agency may submit a reply brief no later than C.O.B. Thursday, December 20, 2007.

Finally, the employer shall be immediately required to perform overtime pay computations for FLSA nonexempt employees under two laws, the DC Code and the FLSA to determine which law provides the greater entitlement to the employee. The employee shall be entitled to the greater entitlement.

#### IV. AWARD

1. The United States Park Police is required to pay back wages to the affected officers who worked overtime hours and were required to be compensated with compensatory time rather than premium pay at the rate of time and one-half. Such back wages shall be paid retroactively from September 22, 2004 until such time as affected employees are made whole. Back wages shall be lost wages minus the value of compensatory time that officers have already received.
2. Employees who have earned but not yet taken compensatory time shall be entitled to be paid premium time at time and one-half unless they prefer to use compensatory time, in which case they shall not also be eligible for back wages for such earned but not yet taken compensatory time. Compensatory time shall be paid at straight time.
3. Unless an accurate computation of overtime hours worked for an employee demonstrates that the employee's benefits will be greater if required to be compensated by compensatory time, USPP is prohibited from requiring any employee to receive compensatory time rather than premium pay at time and one-half. All compensatory time shall be granted at the rate of one hour for every hour of overtime worked, and shall otherwise be available only at the voluntary and freely made request of the employee and authorization of the agency head. There shall be no coercion or intimidation of employees by either management or other employees.
4. USPP must immediately implement a system of computation by which it can be determined whether greater benefits for overtime hours worked during that work period are earned under FLSA or DC Code requirements. The employee shall be entitled to overtime pay under whichever of the two authorities provide the greater entitlement. Without question such a computation will be required should an employee's overtime hours worked not equal one or more whole hours, and therefore rounding under both statutes is required to determine the greater benefit.
5. The FOP request for compensatory time at the time and-one half premium rate is denied.

6. The FOP request for liquidated damages is denied.
  
7. The FOP request for attorney fees and costs is tentatively approved, providing the union briefs this matter and demonstrates that its fees and costs are reasonable, using appropriate justification. The brief must be postmarked or hand delivered no later than December 4, 2007. The agency may submit a reply brief no later than December 20, 2007
  
8. I shall retain jurisdiction over this matter until December 31, 2007 in the event that any part of this award requires clarification.



Donald S. Wasserman  
November 16, 2007  
Washington, DC